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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re Eric M., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC M.,

Defendant and Appellant.

F071813

(Super. Ct. No. JJD068645)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. Michael B. Sheltzer, Judge.

Arthur L. Bowie, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Jessica C. Leal, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Kane, J. and Smith, J.

Appellant Eric M., a minor, appeals from the juvenile court's determination that he is not suitable for deferred entry of judgment (DEJ) under Welfare and Institutions Code section 790 et seq.<sup>1</sup> For the reasons set forth below, we affirm.

## **SUITABILITY INFORMATION<sup>2</sup> AND HEARING**

### *Appellant's Conduct and the Resulting Petitions*

On September 10, 2014, appellant was summoned to the office at his then-current school, Redwood High School, after being observed the previous day with a large group of male students in front of one of the school buildings. When asked to empty his pockets, appellant pulled out a folding knife with a serrated blade. Upon searching appellant's binder, the gang-related phrase "VISA14" was found written inside. Appellant was suspended from school and ultimately expelled.

Appellant then enrolled at Charter Alternative Academy where, on January 27, 2015, appellant was involved in a fight in the cafeteria. According to the victim, appellant approached him in the lunch line and asked, "Where you from?" Before the victim could respond, appellant called him a "scrap" and began punching him in the face.

On February 10, 2015, based on the cafeteria fight, a petition was filed pursuant to section 602 alleging appellant committed a battery on school property, with a felony gang enhancement (count 1). On February 18, 2015, appellant was placed on electronic monitoring. On February 22, 2015, appellant cut the strap to his monitor and absconded.

Appellant was next contacted by the police on February 25, 2015, after being spotted wearing gang attire and walking with another minor near an elementary school. When approached by the police, appellant fled through the school grounds before being

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise noted.

<sup>2</sup> Both parties rely on the March 16, 2015 Report of the Probation Officer (the report) for the relevant facts concerning each allegation in appellant's operative petition. Where relevant, we do as well.

apprehended. Appellant was found in possession of a folding pocket knife. It was later determined that appellant had provided a false name to police when apprehended.

A first amended petition was filed on February 27, 2015, adding four new counts relating to the February 25, 2015 incident: carrying a concealed dirk or dagger (count 2), possessing a weapon on school grounds (count 3), giving false information to a police officer (count 4), and trespassing (count 5). Appellant was ordered detained.

On March 9, 2015, while detained, appellant and two others attacked an individual at the Tulare County Juvenile Detention Facility. Appellant got up from his seat, approached the victim, and struck him twice in the head. Another minor then stomped on the victim's torso three or four times. Video surveillance showed at least one other minor participating in the attack.

As a result, on March 12, 2015, a second amended petition was filed, adding three new counts covering appellant's 2014 conduct at Redwood High and the attack at the Tulare County Juvenile Detention Facility: carrying a concealed dirk or dagger (count 6), possessing a weapon on school grounds (count 7), and assault by means of force likely to produce great bodily injury (count 8).

On April 6, 2015, in a third amended petition, count 8 was amended to felony battery resulting in serious bodily injury. This change made appellant eligible for DEJ. Appellant then admitted to count 1, including the gang enhancement, counts 3, 4, and 7, and count 8, as amended. Counts 2, 5, and 6 were dismissed, and the matter was referred to the probation department for a report and recommendation relating to DEJ suitability.

#### *The Report's Findings and Recommendations*

After detailing appellant's history and statements from both appellant and his mother, the report found one mitigating circumstance (that this was appellant's first petition before the court), and seven aggravating circumstances (being resistant and combative in providing information, a history of explosive tendencies, an apparent gang connection more severe than appellant admitted, failure to participate in the electronic

monitoring program, no respect for authority figures, that appellant posed a threat to the community, and that appellant continued to commit further offenses during the pending court proceedings). Appellant's grade point average was 1.85 (consisting of two D's, two F's, and one "NG" or no-grade), and he had 19 unexcused absences from his time at Charter Alternative Academy. The principal at Charter Alternative Academy expressed the view that appellant's past behavior would not permit him to return if released from custody. The report did find that appellant was motivated to successfully complete the DEJ program and that he had age-appropriate developmental skills. Appellant was deemed in need of counseling based on unresolved grief over his father's death.

The report noted that appellant had cut off the ankle strap to his electronic monitor when previously released, resulting in a period of three days where his whereabouts were unknown and, ultimately, in the arrest resulting in counts 3 through 5. The report further noted that since that arrest, appellant had been in two physical altercations, one resulting in count 8 and the other, occurring on April 1, 2015, resulting in a 24-hour room confinement. Recounting appellant's interview, the report described appellant as "rude, disrespectful, and not forthcoming with answers," while noting he continued to deny any gang association despite evidence to the contrary.

Based on these findings, the report expressed reservations that appellant would be successful in the DEJ program. The report identified gang, temperament, and substance abuse counseling programs that appeared appropriate for appellant and noted that, while multiple placement options had been considered, placement in the home of appellant's mother appeared best. Ultimately, the report recommended that appellant be adjudged a ward of the court and be placed on probation, residing in the home of his mother.

#### *The Suitability Hearing*

On April 28, 2015, the juvenile court held a suitability hearing. Appellant argued for DEJ, while the prosecutor argued for confinement. At the hearing, the probation

officer stated that appellant could only be part of probation's "gang unit" services if placed on probation.

The juvenile court then recited the laws and factors which must be considered to grant DEJ. The court recognized that the decision was left to its discretion before explaining that "there are a number of factors that lead the Court to the conclusion that the minor is not suitable for Deferred Entry of Judgment, including denial and/or minimization of the responsibility for the offenses." The court determined appellant had not been forthcoming in disclosing information to probation and that appellant "needs the added supervision of being on probation that Deferred Entry of Judgment wouldn't provide." However, believing appellant "should be afforded an opportunity to perform on probation," the court denied DEJ, adjudicated appellant a ward of the court, and released him into his mother's custody subject to various conditions of probation.

This appeal timely followed.

## **DISCUSSION**

Appellant argues that the juvenile court abused its discretion in denying DEJ by failing to fully consider all relevant factors, by allegedly imposing a secondary eligibility criterion, and by acting without factual support showing that less restrictive settings would not work.

### **Standard of Review and Applicable Law**

"The DEJ provisions of section 790 et seq. were enacted as part of Proposition 21, The Gang Violence and Juvenile Crime Prevention Act of 1998, in March 2000. The sections provide that in lieu of jurisdictional and dispositional hearings, a minor may admit the allegations contained in a section 602 petition and waive time for the pronouncement of judgment. Entry of judgment is deferred. After the successful completion of a term of probation, on the motion of the prosecution and with a positive recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have

occurred, and any records of the juvenile court proceeding are sealed. (§§ 791, subd. (a)(3), 793, subd. (c).)” (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 558.)

In granting or denying DEJ, the court engages in a two-step process, first determining an applicant’s eligibility and then their suitability for the program. (§ 790, subd. (b).) In this case, there is no dispute appellant was eligible for DEJ.

“Where the minor is eligible for DEJ it is the responsibility of the trial court to independently review the factors specified in section 791, subdivision (b) and determine if the minor will benefit from less restrictive treatment.” (*In re Damian M.* (2010) 185 Cal.App.4th 1, 5.) These factors include “the defendant’s age, maturity, educational background, family relationships, demonstrable motivation, treatment history, if any, and other mitigating and aggravating factors in determining whether the minor is a person who would be benefited by education, treatment, or rehabilitation.” (§ 791, subd. (b).) “The court thus ‘has the ultimate discretion to rule on the suitability of the minor for DEJ after consideration of the factors specified in [California Rules of Court,] [former] rule 1495(d)(3) [now rule 5.800(d)] and section 791, subdivision (b), and based upon the “standard of whether the minor will derive benefit from “education, treatment, and rehabilitation” rather than a more restrictive commitment.”’” (*In re Joshua S.* (2011) 192 Cal.App.4th 670, 677.)

“When the juvenile court denies a request for DEJ where the minor is statutorily eligible, we review the decision under the abuse of discretion standard.” (*In re Damian M., supra*, 185 Cal.App.4th at p. 5.) Judicial discretion is abused only if it results in an arbitrary or capricious disposition, or implies whimsical thinking, and “exceeds the bounds of reason, all of the circumstances being considered.” (*People v. Giminez* (1975) 14 Cal.3d 68, 72; *Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 783.)

### **The Court Did Not Abuse Its Discretion**

Having reviewed the record and arguments, we find no abuse of discretion by the juvenile court in denying DEJ. In this case, the court was faced with a juvenile who had been increasingly violent despite increased correctional efforts. Appellant had been expelled from his original high school for carrying a knife, only to attack a student at his new school while making gang-related statements. When put on electronic monitoring, appellant removed the monitor and fled. When apprehended, appellant was once again carrying a knife. When subsequently placed in custody, appellant again attacked another individual.

This escalating pattern of behavior was coupled with failing grades and another potential expulsion, an attempt by appellant to lie to law enforcement about his identity, and a refusal to cooperate fully in the probation report process. As a result, the report did not find appellant suitable for DEJ, but instead expressed “reservations the minor would be a successful candidate.”

The juvenile court stated that it had “read and considered the social study prepared by probation and other relevant evidence,” and confirmed that its analysis was “governed by the factors in 790(b) and 791 of the Welfare and Institutions Code, as well as [California] Rules of Court, [rule] 5.800(b)(3)” before listing the relevant factors it must consider, including “whether or not the minor would benefit from education treatment and rehabilitation efforts.” The court further identified three specific reasons why denial of DEJ was appropriate: appellant’s denial or minimization of responsibility for his behavior, appellant’s attitude towards disclosing information to probation, and appellant’s need for added supervision above what DEJ could provide. Considering all of the circumstances being considered, the juvenile court’s decision falls well within its discretion.

In light of our review, we disagree with appellant’s contentions that the juvenile court failed to fully consider all relevant factors or acted without factual support showing

that less restrictive settings would not work. Unlike when granting DEJ, there is no requirement that the juvenile court make findings on the record that a minor is not suitable for DEJ. (Cf. § 790, subd. (b) [“The court shall make findings on the record that a minor is appropriate for deferred entry of judgment pursuant to this article in any case where deferred entry of judgment is granted.”].) Courts are presumed to be aware of and have followed the applicable law in sentencing decisions and, in this case, the juvenile court made clear it was aware of the relevant factors and was applying them. (*In re Julian R.* (2009) 47 Cal.4th 487, 498-99; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496.) Moreover, as detailed above, there was more than adequate factual support for the juvenile court’s determination that a less restrictive setting would not work. Appellant showed an escalating pattern of behavior with minimal accountability and a willingness to abscond from supervision, all resulting in probation failing to recommend DEJ.

Appellant further argues that the juvenile court imposed an additional eligibility factor—that a juvenile not have a gang enhancement—in order to exact some form of “societal retribution.” We disagree. Appellant’s argument hinges on connecting the court’s third reason for denying DEJ, that appellant “needs the added supervision of being on probation that Deferred Entry of Judgment wouldn’t provide,” with a statement from the probation officer that gang unit services for juvenile probationers cannot be received by those granted DEJ. According to appellant, the juvenile court’s suggestion that “added supervision” is needed necessarily referred to the gang services and, thus, the probation officer’s refusal to provide that service precludes any individual with a gang enhancement from receiving DEJ.

Appellant’s argument suffers from three flaws. First, as detailed above, the evidence before the juvenile court provided ample support for denying DEJ regardless of the potential need for additional gang services. Second, the court was made aware that it could order the disputed gang services through the DEJ program. Under section 794, the court “may, in consultation with the probation department, impose any other term of



probation authorized by this code that the judge believes would assist in the education, treatment, and rehabilitation of the minor and the prevention of criminal activity.” As appellant’s counsel noted to the court, if a program is “available for someone on probation, it should be available for someone on DEJ.” And third, the record does not demonstrate that the juvenile court was referring to the disputed gang services at all when expressing its reasoning. Appellant identifies no direct connection in the record and we have found none. It is just as likely that the court was referring to the ability to hold appellant on probation as a ward for longer than the 36 months permitted under DEJ than to any allegedly unavailable gang services. (See § 791, subd. (a)(3).) Accordingly, we find no abuse of discretion in the juvenile court’s decision. Appellant was not excluded based on an unenumerated eligibility factor.

#### **DISPOSITION**

The judgment is affirmed.